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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ORLANDO SALAS, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

WHIRLPOOL CORPORATION and AIG  
WARRANTYGUARD, INC.,

Defendants.

Case No. 5:23-CV-01549-AB-KK

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION TO  
DISMISS COMPLAINT**

[Filed concurrently with Motion to  
Dismiss; Request for Judicial Notice;  
Declaration of Ethan J. Bond;  
[Proposed] Order]

Hearing Date: December 8, 2023  
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## 1 **I. INTRODUCTION**

2 On July 21, 2022, Plaintiff Orlando Salas bought a Whirlpool range that later  
3 needed repairs. Unhappy with the quality of service he received, Salas filed this class-  
4 action complaint against Defendants AIG Warrantyguard, Inc. (“AIGWG”) and  
5 Whirlpool Corporation on behalf of himself and a putative class of California home-  
6 appliance purchasers who Salas alleges were deceived into purchasing extended-  
7 warranty service contracts that were inferior to the original manufacturer warranty.

8 Salas lacks standing to bring the case because the allegations have largely  
9 nothing to do with him; Salas does not plead that he suffered a concrete injury or that  
10 AIGWG caused it. The crux of Salas’s Complaint is that Defendants allegedly  
11 concocted a secret payout scheme to deceive purchasers out of the true value of their  
12 products by systematically buying out those products below their fair value rather than  
13 repairing them. Compl. ¶¶ 8-10, 47, 59-61, 66, 98, 106(a), 106(b), 107(d), 110(e),  
14 124, 140(a)(iii), 140(d). Those (false) allegations fail for many reasons, including that  
15 they have nothing to do with Salas because he does not allege a buyout. On the  
16 contrary, *he alleges that his range was repaired*. In any event, the service contract  
17 that Salas attached to the Complaint expressly discloses the buyout terms. That is just  
18 one example showing why Salas lacks standing. There are others.

19 While the Complaint spans some forty-eight pages, Salas fails to state any claim  
20 against AIGWG. By way of example, Salas sued AIGWG for breach of contract, yet  
21 he does not identify even one provision that AIGWG breached. That’s because his  
22 case has nothing to do with breach of contract. In reality, Salas brings a deception  
23 claim based on AIGWG’s allegedly hiding the buyout option from him. But again,  
24 that option is an *express term* in the contract. Salas had at least *five chances* to read it  
25 before purchase. And, he *agreed* that he read the terms before purchasing via an  
26 enforceable online click-through agreement – i.e., he was required to click a button  
27 certifying that he read the contract. The Court can take judicial notice of those facts.  
28 The contract also contains a “free look” provision, so even if Salas somehow missed



1 the terms that he certified he read, he could have canceled after the contract was  
 2 delivered. There was no deception. Salas simply does not like his bargain and is  
 3 trying to use consumer-protection laws to change the deal. Per binding precedent, that  
 4 is not allowed under California law. Those are just some of the many reasons that  
 5 Salas's Complaint is incurably defective. There are other reasons detailed in this brief.

6 *First*, Salas lacks Article III and statutory standing to bring the case. *Second*,  
 7 Salas does not (and cannot) identify a single provision in the service contract that  
 8 AIGWG breached, so he fails to state a breach of contract claim. *Third*, Salas's Song-  
 9 Beverly claim fails as a matter of law because AIGWG made the contract terms  
 10 available to Salas pre-purchase, he agreed he read them, the contract's exclusions are  
 11 sufficiently "clear and conspicuous," and the contract does not impermissibly overlap  
 12 with the original manufacturer warranty. *Fourth*, Salas's CLRA and UCL claims fail  
 13 as a matter of law because the underlying allegations fail the applicable pleading  
 14 standards and do not meet the elements of either claim, among other reasons. And  
 15 *fifth*, the plain language in the service contracts—which Salas attaches to the  
 16 Complaint—bars Salas from at least some of the recovery he seeks.

17 This Court should dismiss the Complaint with prejudice. Amendment would  
 18 be futile because Salas has no standing to bring the case and the contract itself  
 19 precludes Salas's theories of liability.

## 20 **II. FACTUAL BACKGROUND**

21 Salas alleges that on July 21, 2022, he bought a Whirlpool range that included  
 22 a one-year manufacturer's warranty issued by Whirlpool. Compl. ¶¶ 4, 37, 67. A  
 23 month later, Salas allegedly received a Whirlpool marketing email urging him to  
 24 purchase an extended-warranty service plan. Compl. ¶ 68. On September 13, 2022,  
 25 Salas allegedly bought a one-year, extended-warranty service plan (the "Service  
 26 Contract")—which he attached to the Complaint as Exhibit 1—under which  
 27 Whirlpool is the "administrator" and AIGWG is the "obligor." Compl. ¶ 71; Compl.  
 28 Ex. 1. AIGWG then emailed Salas a certificate of coverage—attached to the

1 Complaint as Exhibit 5—confirming that the Service Contract would take effect on  
2 July 1, 2023 and expire on June 30, 2024. Compl. ¶ 73; *id.* Ex. 5.

3 In January 2023, while Whirlpool’s manufacturer warranty was in effect and  
4 before the Service Contract took effect, Salas’s range allegedly malfunctioned.  
5 Compl. ¶ 78. He allegedly called the number on the certificate of coverage, rather  
6 than the Whirlpool manufacturer warranty number, to request a repair. Compl. ¶ 78.  
7 As a result, he allegedly received a service visit from Whirlpool’s “Service Plan”  
8 department, which is allegedly responsible for administering the Service Contract,  
9 rather than a visit from Whirlpool’s “Warranty Department,” which allegedly  
10 handles repairs under Whirlpool’s manufacturer warranty. Compl. ¶ 79.  
11 Whirlpool’s service plan department allegedly sent a technician, who “serviced the  
12 appliance within the parameters that Defendants established for the Service Plan.”  
13 Compl. ¶¶ 79, 81. Those service parameters are allegedly different than, and inferior  
14 to, those under Whirlpool’s manufacturer warranty (Compl. ¶¶ 81-83), which was  
15 still in effect at the time Whirlpool serviced the range. Compl. ¶ 78. Salas allegedly  
16 “took time off from work to meet the repair technician and lost the opportunity to  
17 earn income during this period.” Compl. ¶ 80. Nevertheless, Salas alleges that his  
18 “concerns about the product remained unresolved after the service visit,” so he  
19 allegedly paid a third-party repair person to fix his appliance. Compl. ¶ 82.

20 Salas alleges that but for “Defendants’ . . . misrepresentations about the  
21 Service Plans,” Salas “would have called the Whirlpool Warranty Department (not  
22 the Whirlpool Service Plan Department) and received service under a different  
23 standard which likely would have resulted in his appliance getting being [sic]  
24 repaired at no out-of-pocket costs to him.” Compl. ¶ 83. Those  
25 “misrepresentations,” Salas alleges, are found on the “Whirlpool Websites”—*five*  
26 *websites*<sup>1</sup> that Whirlpool “owns and operates.” Compl. ¶ 34. Salas does not allege  
27

28 <sup>1</sup> www.amana.com, www.jennair.com, www.kitchenaid.com,  
www.maytag.com, and www.whirlpool.com

1 that AIGWG owns or operates the Whirlpool Websites. He alleges, however, that  
 2 AIGWG “allows its Service Plans to be sold through the Whirlpool Websites” and  
 3 “receives financial benefits from its collaboration with Whirlpool on the marketing  
 4 and sale of Service Plans to consumers.” Compl. ¶¶ 66(a), (i).

5 The purported false representations found on the Whirlpool Websites  
 6 allegedly include that the service plans offer “100% Factory Certified Parts and  
 7 Technicians” even though “AIG[WG]” allegedly has the right to swap a covered  
 8 appliance with a refurbished appliance (Compl. ¶ 107(e)), that the service plans are  
 9 a mere extension of the Whirlpool manufacturer warranty when in fact they are  
 10 inferior (Compl. ¶¶ 3, 4, 107(a), 136, 140(a), 140(g)), and “If We can’t Fix it – We  
 11 Replace It” (Compl. ¶¶ 107(b), (c)).

12 Salas also alleges that “Defendants” “[t]ak[e] advantage of the consumer  
 13 confusion created about the source of the Service Plans by sending service request  
 14 instructions that cause policyholders whose appliances are still under the original  
 15 manufacturer’s warranty to contact the Whirlpool Service Plan Department where  
 16 they receive inferior levels of service than what such policyholders would have  
 17 otherwise received.” Compl. ¶ 140(h). He further alleges that AIGWG falsely  
 18 represented that its long-term service plans provide better value than its short-term  
 19 ones (Compl. ¶¶ 106(d), 107(g), 137, 140(b)) and that AIGWG did not make the  
 20 Service Contract terms available before he bought it. Compl. ¶ 72. Had Salas known  
 21 “the full extent of Defendants’ policies with regard to the Service Plans,” Salas  
 22 allegedly “would have looked for other service plans, would not have purchased the  
 23 Service Plan, or would have paid less to purchase the Service Plan.” Compl. ¶ 84.

24 Finally, Salas devotes a significant portion of the Complaint to allegations  
 25 that “Defendants” employ a secret business practice to establish a dollar limit, which  
 26 Salas calls a “Payout Limit,” that determines how much they will pay to repair or  
 27 replace an appliance under the service plan. Compl. ¶¶ 8-10, 47, 59-61, 66, 98,  
 28 106(a), 106(b), 107(d), 110(e), 124, 140(a)(iii), 140(d). Salas alleges that if the costs

1 exceed that secret Payout Limit, “Defendants” systematically exercise their  
 2 contractual option to “buy out” the appliance in cash rather than repair it. *Id.* The  
 3 buyout terms appear in Section 14 of the Service Contract. Compl. Ex. 1. Those  
 4 terms, which Salas agreed to, expressly disclose the buyout depreciation schedule.  
 5 *Id.* But the buyout option allegedly “does not provide the Plan purchaser with  
 6 sufficient compensation to repair his appliance or to purchase a replacement.”  
 7 Compl. ¶ 9. That practice, which we refer to in this brief as the “Payout Scheme” is  
 8 allegedly an “integral part of [AIGWG’s] business model.” Compl. ¶ 59(d). Salas  
 9 does not allege that AIGWG exercised the Payout Scheme as to *his* range; on the  
 10 contrary, *he alleges that his range was repaired.* Compl. ¶¶ 81-83.

### 11 **III. LEGAL STANDARD**

12 A district court must dismiss a complaint if it lacks subject matter jurisdiction  
 13 to hear the claims alleged in the complaint. Fed. R. Civ. P. 12(b)(1). “Standing is a  
 14 threshold matter central to our subject matter jurisdiction.” *Bates v. United Parcel*  
 15 *Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007).

16 Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed  
 17 if it fails to state a claim upon which relief can be granted. *Ashcroft v. Iqbal*, 556 U.S.  
 18 662, 678 (2009); Fed. R. Civ. P. 8(a). Formulaic recitations of causes of action with  
 19 conclusory allegations are not sufficient; rather, a plaintiff must plead facts showing  
 20 that a violation is not merely possible but plausible. *Iqbal*, 556 U.S. at 678 (citing  
 21 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). When deciding a Rule  
 22 12(b)(6) motion, courts may consider not only the complaint’s allegations but also its  
 23 exhibits and documents incorporated by reference. *Swartz v. KPMG LLP*, 476 F.3d  
 24 756, 763 (9th Cir. 2007); *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002).

### 25 **IV. ARGUMENT**

#### 26 **A. Salas Lacks Standing to Sue.**

27 As a threshold matter, Salas lacks Article III standing to bring many of his  
 28 allegations (which affect all his claims) and to seek injunctive relief. He also lacks

1 statutory standing to bring his CLRA, Song-Beverly, and UCL claims.

2 **(1) *Salas Lacks Article III Standing Because He Has Not Pled Any***  
 3 ***Concrete Injury.***

4 “To have standing under Article III, a plaintiff must have (1) a concrete and  
 5 particularized injury that (2) is caused by the challenged conduct. . . .” *Juliana v.*  
 6 *United States*, 947 F.3d 1159, 1168 (9th Cir. 2020). The plaintiff bears the burden of  
 7 pleading facts sufficient to support a finding of Article III standing. *See Lujan v. Defs.*  
 8 *of Wildlife*, 504 U.S. 555, 560-61 (1992).

9 Salas lacks Article III standing to sue AIGWG because he cannot show that his  
 10 claimed injury was caused by AIGWG’s alleged conduct. In fact, AIGWG’s alleged  
 11 conduct has nothing to do with Salas. The crux of the Complaint is that AIGWG  
 12 allegedly participated in a nefarious “Payout Limit” scheme to defraud purchasers  
 13 from realizing the full value of their products. Compl. ¶¶ 8-10, 16-17, 47, 55-56, 59,  
 14 61, 66, 98, 106, 108, 110, 124, 140. According to Salas, “Defendants regularly choose  
 15 to issue a Payout rather than to repair or replace a covered appliance even when this  
 16 option does not provide the Plan purchaser with sufficient compensation to repair his  
 17 appliance or to purchase a replacement.” *Id.* ¶ 9. Those allegations are false and not  
 18 pled with anything approaching particularity (as explained in Section IV.D.1 below),  
 19 and the payout limits are in the Service Contract. Compl. Ex. 1 § 14. But even taking  
 20 the allegation as true, Salas never alleges that Defendants bought out *his* range. On  
 21 the contrary, *Salas alleges that his range was repaired* (Compl. ¶¶ 81-82), so Salas  
 22 cannot trace that alleged conduct of AIGWG to his claimed injury, and he therefore  
 23 lacks standing to pursue any claim based on the alleged Payout Scheme.

24 The same is true of other allegations, including at least the following. Salas  
 25 alleges that Defendants improperly forced customers to dispose of bought-out  
 26 products (Compl. ¶¶ 16, 17, 59, 108), but Salas does not allege that Defendants bought  
 27 out *his* range or forced *him* to dispose of it. Salas also alleges that Defendants falsely  
 28 represent that their long-term service plans provide better value than their short-term

1 service plans (Compl. ¶¶ 106(d), 107(g), 137, 140(b)), but according to the certificate  
 2 of coverage attached to the Complaint (Ex. 5), Salas purchased a one-year service  
 3 plan—*the shortest available*—so Salas cannot show that he was duped into  
 4 purchasing a long-term service plan. Salas also alleges that Defendants falsely  
 5 represented that the service plans offer “100% Factory Certified Parts and  
 6 Technicians” even though they have the right to swap a covered appliance with a  
 7 refurbished appliance (Compl. ¶ 107(e)), but Salas does not allege that Defendants  
 8 swapped his range for a refurbished range. Salas also alleges that Whirlpool (*but not*  
 9 *AIGWG*) falsely represented, “If We can’t Fix it – We Replace It” (Compl. ¶¶ 107(b),  
 10 (c)), but Salas does not allege that Whirlpool couldn’t fix his range or failed to offer  
 11 a replacement.

12 Because those allegations have nothing to do with Salas, he cannot show that  
 13 AIGWG caused his claimed injury, so he lacks standing to sue. *See Birdsong v. Apple,*  
 14 *Inc.*, 590 F.3d 955, 956-57, 961 (9th Cir. 2009) (dismissing UCL claim for lack of  
 15 Article III standing in warranty context where the plaintiffs failed to plead a concrete  
 16 injury to themselves); *see also Mohamed v. Kellogg Co.*, 2015 WL 12469107, at \*5  
 17 (S.D. Cal. Aug. 19, 2015).

## 18 (2) *Salas Lacks Standing to Seek Injunctive Relief*

19 Salas also lacks Article III standing to seek injunctive relief. Compl. ¶¶ 114,  
 20 116. Salas does not (and cannot) allege that AIGWG caused him any harm, so he  
 21 could never demonstrate that AIGWG is likely to cause him the same “harm” a second  
 22 time. But that is exactly what Article III requires. Where standing is premised on the  
 23 threat of repeated injury, the plaintiff must show not only an actual and imminent  
 24 injury, but also a “sufficient likelihood that he will again be wronged in a similar  
 25 way.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Salas cannot allege that  
 26 he is likely to be similarly “wronged” by AIGWG in the future. That is especially  
 27 true because he alleges that his range was repaired. Compl. ¶ 82. Salas thus lacks  
 28 standing to seek injunctive relief, including public injunctive relief. Compl. ¶ 116;



1 *see Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1087 (9th Cir. 2020) (“[T]o seek  
2 public injunctive relief in federal court, [the plaintiff] must . . . allege that she has  
3 Article III standing.”).

4 **(3) *Salas Lacks Statutory Standing to Sue Because He Was Not***  
5 ***Injured by AIGWG’s Alleged Statutory Violations.***

6 For similar reasons, Salas additionally lacks statutory standing (which is  
7 “substantially narrower” than Article III standing (*Kwikset Corp. v. Super. Ct.*, 51 Cal.  
8 4th 310, 322, 324 (2011)) to sue under the Song-Beverly Act (Count 3), the CLRA  
9 (Count 2), and the UCL (Count 4).

10 “Under all three statutes, only someone who has been damaged by the failure  
11 to comply with the statute may bring suit.” *Naseri v. Greenfield World Trade, Inc.*,  
12 2021 WL 3511040, at \*2 (C.D. Cal. Aug. 10, 2021). “Under the Song-Beverly Act,  
13 only a buyer of consumer goods *who is damaged* by a failure to comply with any  
14 obligation under this chapter or under an implied or express warranty or service  
15 contract may bring an action for the recovery of damages and other legal and equitable  
16 relief.” *Id.* (citing Cal. Civ. Code § 1794(a)). “Under the CLRA, [a]ny consumer *who*  
17 *suffers any damage* as a result of the use or employment by any person of a method,  
18 act, or practice declared to be unlawful by Section 1770 may bring an action against  
19 that person.” *Id.* (citing Cal. Civ. Code § 1780). And under the UCL, following the  
20 passage of Proposition 64, a plaintiff must “(1) establish a loss or deprivation of  
21 money or property sufficient to qualify as injury in fact . . . , and (2) show that that  
22 economic injury was the result of . . . the unfair business practice or false advertising  
23 that is the gravamen of the claim.” *Kwikset*, 51 Cal. 4th at 322.

24 Salas does not have standing to bring his Song-Beverly, CLRA, or UCL claims  
25 because he does not (and cannot) allege that AIGWG caused him “damage[] by [its  
26 alleged] failure to comply with th[ose] statute[s].” *Naseri*, 2021 WL 3511040, at \*2.  
27 For the reasons explained throughout this brief, Salas could not have suffered any  
28 damages, losses, deprivation of money, or economic injury as a result of AIGWG’s

1 alleged conduct because that conduct had nothing to do with Salas. *See Lassen v.*  
 2 *Nissan N. Am., Inc.*, 211 F. Supp. 3d 1267, 1283 (C.D. Cal. 2016).

3 **B. Salas Fails to State a Claim for Breach of Contract (Count One).**

4 This Court should dismiss Salas’s breach of contract claim because he did not  
 5 plead essential elements of the claim, namely that AIGWG failed to perform any  
 6 provision in the contract, or that AIGWG’s (unpled) breach caused Salas harm for  
 7 which AIGWG can be held liable. Indeed, Salas doesn’t identify a *single* provision  
 8 in the Service Contract that AIGWG allegedly breached.<sup>2</sup>

9 Under California law, to establish a breach of contract, Salas was required to  
 10 allege that (1) the parties had a contract, (2) Salas performed, (3) AIGWG did not  
 11 perform, and (4) AIGWG’s nonperformance caused Salas harm. *Oasis W. Realty,*  
 12 *LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). “Causation resulting in damage is an  
 13 essential element of a claim for breach of contract.” *Manchester v. Sivantos GMBH*,  
 14 2019 WL 3734307, at \*3 (C.D. Cal. Aug. 7, 2019) (citation omitted).

15 **(1) Salas Fails to Plead that AIGWG Breached Any Provision.**

16 Even if coverage under the Service Contract was in effect when Salas’s range  
 17 allegedly malfunctioned (and it was not, as explained in Section IV.C.2 below),  
 18 Salas’s breach of contract claim fails at the threshold because Salas does not allege  
 19 what provision in the Service Contract AIGWG breached and how AIGWG failed to  
 20 perform—an essential element of breach of contract.<sup>3</sup> Although Salas focuses on the  
 21 alleged Payout Scheme (which has nothing to do with him), he never explains what  
 22

23 <sup>2</sup> Salas also alleges that AIGWG breached its duty of good faith and fair dealing  
 24 because of the “manner in which AIG[WG] enforces the Buyout provisions.” Compl.  
 25 ¶ 98. As explained throughout this brief, Salas has no standing to challenge the  
 26 Buyout provision, which in any event is an express term in the Service Contract that  
 Salas certified he read and had no less than 30 days (and up to 60 days) to cancel upon  
 receipt. Compl. Ex. 1, §§ 14, 19, 32.

27 <sup>3</sup> *See Martinez v. Ford Motor Co.*, 2022 WL 14118926, at \*3 (S.D. Cal. Oct.  
 28 24, 2022) (dismissing claim where “Plaintiff does not plead how Defendant Ethos  
 allegedly violated this service contract. . . . Plaintiff has not alleged any facts—such  
 as dates of service, failures of repayment, or functional parts withheld—to afford  
 Defendant Ethos fair notice of its alleged violation”).



1 that alleged scheme has to do with a breach of contract claim. The same is true of  
 2 Salas's allegation that the Service Contract warranty was "inferior to what Plaintiff  
 3 and Class members would have been able to obtain under Whirlpool's manufacturer's  
 4 warranty." Compl. ¶ 99. Salas's Complaint is replete with complaints about the  
 5 contract he agreed to, but he does not allege that AIGWG actually breached the  
 6 Service Contract. Salas admits as much, alleging that "[n]othing in the Service  
 7 Contract put Plaintiff or the Class on notice that the Service Plan would provide them  
 8 with a level of service below what is offered under Whirlpool's manufacturer's  
 9 warranty." Compl. ¶ 99 (emphasis added). AIGWG cannot have breached a provision  
 10 that Salas admits does not exist.

11 Moreover, the Service Contract was not even in effect in January 2023. The  
 12 Service Contract's Certificate of Coverage, which Salas attached as Exhibit 5 to the  
 13 Complaint, shows that AIG's extended coverage didn't start until July 2023. AIG  
 14 could not have breached contractual obligations it did not even have then.

15 Rather than identify any provision that AIGWG allegedly breached, Salas  
 16 *admits that AIGWG performed* (assuming that AIGWG had any obligations when  
 17 Salas made his service call in January 2023, which it did not, and assuming that  
 18 AIGWG had service obligations at any time, which it did not): "On the date of  
 19 scheduled service, the service technician sent by the Whirlpool Service Plan  
 20 Department *serviced the appliance within the parameters that Defendants established*  
 21 *for the Service Plan.*" Compl. ¶ 81 (emphasis added). Salas's failure to allege  
 22 AIGWG's nonperformance of a contractual duty it actually owed is fatal to his breach  
 23 of contract claim against AIGWG.<sup>4</sup>

24  
 25  
 26  
 27 <sup>4</sup> *Hansen v. Marin Gen. Hosp.*, 2019 WL 1509182, at \*2 (N.D. Cal. Apr. 5,  
 28 2019) (dismissing breach of contract claim with prejudice because "Hansen still does  
 not allege how Anthem breached specific provisions of a specific contract *he* had with  
 Anthem.") (emphasis added).

1                   ***(2) Salas fails to Plead any Resulting Damages.***

2           Salas never explains how the alleged Payout Scheme (which has nothing to do  
3 with breach of contract) caused Salas any harm, namely because *Salas does not allege*  
4 *that AIGWG exercised a buyout* for Salas’s range. On the contrary, *Salas admits that*  
5 *his range was repaired*. Compl. ¶¶ 81-82. Salas has not pled (and cannot plead) facts  
6 supporting the necessary elements for breach of contract.

7           **C. Salas Fails to State a Claim for Violations of the Song-Beverly Act**  
8           **(Count Three).**

9           Salas alleges that Defendants violated California’s Song-Beverly Act in three  
10 ways. *First*, Salas alleges that Defendants did not provide the Service Contract terms  
11 until after Salas bought the warranty. Cal. Civ. Code § 1794.41(a)(2). *Second*, Salas  
12 alleges that the Service Contract’s exclusions are not “clear and conspicuous.” *Id.* §  
13 1794.4(c)(5)(A), (B); *id.* § 1791(u). And *third*, Salas alleges that the Service  
14 Contract’s coverage period impermissibly overlaps with the manufacturer warranty’s  
15 coverage period. *Id.* § 1794.41(a)(3). Salas is wrong as a matter of law, and his Song-  
16 Beverly Act claim should be dismissed for at least four reasons.

17           ***(1) Salas Agreed that he Read the Contract Terms that AIGWG***  
18           ***provided him Before Purchase Per Judicially Noticeable Facts.***

19           Under California’s Song-Beverly Act, “[a]ny buyer of consumer goods who is  
20 damaged by a failure to comply with any obligation . . . under an implied or express  
21 warranty or service contract may bring an action for the recovery of damages and  
22 other legal and equitable relief.” Cal. Civ. Code § 1794(a). The Song-Beverly Act  
23 requires that every service contract “be available for inspection by the buyer prior to  
24 purchase and either the contract, or a brochure which specifically describes the terms,  
25 conditions, and exclusions of the contract, and the provisions of this section relating  
26 to contract delivery, cancellation, and refund, shall be delivered to the buyer at or  
27 before the time of purchase of the contract.” *Id.* § 1794.41(a)(2). Where the service  
28 contract’s terms “were made available, then the purchaser has no claim under Cal.

1 Civ. Code § 1794.41(a)(2).” *Sanbrook v. Office Depot, Inc.*, 2009 WL 840020, at \*2  
 2 (N.D. Cal. Mar. 2009).

3 As explained to Salas’s counsel at the Local Rule 7-3 conference, AIGWG  
 4 makes the Service Contract available to all purchasers (including Salas) before they  
 5 buy the contract. As reflected on AIGWG’s website, which this court can take judicial  
 6 notice of (*see* Request for Judicial Notice (“RJN”); Bond Declaration ¶¶ 2-13), Salas  
 7 had no less than *five* opportunities to review the Service Contract, not only on the  
 8 home page but also throughout the checkout process.<sup>5</sup> Salas’s own Complaint  
 9 includes a screenshot of that home page with the hyperlinked “terms and conditions”  
 10 that takes purchasers to the contracts. Compl. ¶ 45. Perhaps most importantly, even  
 11 if Salas missed the terms there (and in the several other opportunities he had  
 12 throughout the checkout process), he was required to *certify* before purchase that he  
 13 read the terms and conditions in the hyperlink in the middle of the purchase page<sup>6</sup>:

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15 ///

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23

24 <sup>5</sup> The consumer purchase pathway is described more fully in the AIGWG’s  
 25 Request for Judicial Notice and in the supporting Bond Declaration, which attaches  
 26 the relevant screenshots as Exhibits A-I. Those documents confirm that consumers  
 27 have at least five chances to access an e-copy of the service contract on the service  
 plan website (<https://serviceplans.whirlpool.com/>), which Salas references in his  
 Complaint (¶ 40 n.3).

28 <sup>6</sup> *See* Bond Decl. Ex. I (consumers must check a box certifying that “I have read  
 and accept the Service Plan terms & conditions[] and agree to electronic delivery of  
 my plan related documents” to make their plan purchase).

The screenshot shows the Whirlpool website's payment page. The main section is titled 'Your Payment Information' and includes fields for Credit Card Number, Type of Card, Name on Card, Expiration Date, and Security Code. Below these is a section to 'Please Confirm Your Billing Address' with a redacted address and an 'Edit' link. A checkbox for terms and conditions is present. At the bottom are fields for Captcha and Promo Code. The right sidebar, titled 'ORDER SUMMARY', shows a Total Plan Cost of \$199.95, Savings of \$0.00, and a final 'You Pay' amount of \$199.95. The footer contains legal disclaimers and links to Terms of Use and Privacy.

Salas thus agreed that the Service Contract's terms were available at the website he identifies in his Complaint (<https://serviceplans.whirlpool.com/> (Compl. ¶ 40 n.3)) and that he read them at the time he purchased the contract. That kind of clickwrap agreement is enforceable in California. *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 470 (2021) (“[C]lickwrap agreements, in which website users are required to click on an ‘I agree’ box after being presented with a list of terms and conditions of use’ to ‘confirm their assent to the agreement’s terms,’ are generally considered enforceable.”). Simply put, Salas certified that he reviewed the terms, so he cannot now claim ignorance and use consumer laws to back out of the deal. Because the terms “were made available . . . [Salas] has no claim under Cal. Civ. Code § 1794.41(a)(2).”<sup>7</sup> *Sanbrook*, 2009 WL 840020, at \*2.

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<sup>7</sup> The Service Contract also contains a “free look” provision, which gave Salas no less than 30 days after delivery of the contract to cancel. Compl. Ex A ¶¶ 19, 32.

(2) *The Service Contract Did Not Impermissibly Overlap with the Manufacturer’s Warranty.*

The exhibits that Salas attached to his Complaint, including the Service Contract and AIGWG’s certificate of coverage, bar Salas’s Song-Beverly Act claim based on a contractual overlap. *Meisner v. JPMorgan Chase Bank, N.A.*, 2022 WL 837230, at \*1 (E.D. Cal. Mar. 18, 2022) (dismissing complaint with prejudice where the plaintiff’s allegations “contradict the documents attached to his complaint”).

The Song-Beverly Act says that “[n]o service contract covering any . . . home appliance[] or home electronic product purchased for use in this state may be offered for sale or sold unless. . . [t]he contract is applicable only to items, costs, and time periods not covered by the express warranty.” Cal. Civ. Code § 1794.41(a)(3). Salas alleges that the Service Contract impermissibly overlapped with the Whirlpool manufacturer warranty. Compl. ¶ 128. But that allegation is incurably defective because Salas has a timing problem. According to Salas’s own allegations and the exhibits he attached to the Complaint, *there was no impermissible coverage overlap*. Salas alleges that he bought his range on July 21, 2022, which came with Whirlpool’s one-year manufacturer warranty. Compl. ¶¶ 4, 37, 67. He claims that the manufacturer warranty was in effect when his range allegedly malfunctioned and was serviced in January 2023. Compl. ¶¶ 71, 78-82.

But the certificate of coverage that Salas attached to the Complaint confirms that coverage under the Service Contract did not kick in until July 2023—*six months later*. Compl. Ex. 5 (“Effective Date: 7/1/2023”). And it also confirms that “Parts and Service currently covered under the manufacturer’s warranty *will be provided by the manufacturer.*” *Id.* (emphasis added). The Service Contract itself (which Salas also attached to the Complaint) also unequivocally confirms that coverage would not kick in until *after* the manufacturer warranty expired: “**EXCLUSIONS – This contract does not cover . . . G. Repairs and replacements covered by the manufacturer or supplier’s warranty, . . .**” Compl. Ex. 1 § 18G (emphasis in

original). Salas even admits as much. *See, e.g.*, Compl. ¶ 37 (alleging that Whirlpool’s website “explains the Service Plan as beginning *after the manufacturer’s warranty ends*”) (emphasis added). There was no impermissible coverage overlap, so his Song-Beverly claim under this provision fails as a matter of law.<sup>8</sup> *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1308 (S.D. Cal. 2003) (“Plaintiff must . . . specifically plead what specific requirements of . . . the Song Beverly Act were not complied with and what damages were suffered by such omissions.”).

And, because the Service Contract was not in effect when Salas’s range was allegedly serviced, there is no overlap that plausibly caused him any harm, which is an independent reason to reject this claim.

### (3) *The Service Exclusions Were “Clear and Conspicuous”*

The Song-Beverly Act also requires, in relevant part, that “[t]he service contract . . . contain . . . clear and conspicuous statements of the following: (A) Any services, . . . repairs, or remedies that are excluded from the scope of the service contract. (B) Any other limits on the application of the language in subdivision (b) . . .” Cal. Civ. Code § 1794.4(c)(5)(A-B). Subdivision (b) says that “[e]xcept as otherwise expressly provided in the service contract, every service contract shall obligate the service contractor to provide to the buyer of the product all of the services and functional parts that may be necessary to maintain proper operation of the entire product under normal operation and service for the duration of the service contract and without additional charge.” *Id.* § 1794.4(b).

Salas’s allegation that the exclusions in the Service Contract are not sufficiently “clear and conspicuous” under Song-Beverly fails as a matter of law. Compl. ¶ 122.

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<sup>8</sup> As explained in Whirlpool’s motion to dismiss, even if there was a potential de minimis overlap of days in July 2023, that overlap additionally would not violate the Song-Beverly Act because the Service Contract provides benefits not available under the Whirlpool manufacturer warranty. *See* Whirlpool Memorandum at Section III.B; Cal. Civ. Code § 1794.41(a)(3).



1 a) Section 1794.4 does not provide a private right of action.

2 As a threshold matter, “Cal. Civ. Code § 1794.4 . . . is simply a detailed  
3 description of what information is required to be included in a service contract. No  
4 remedy or right of action is provided in § 1794.4.” *See Von Grabe*, 312 F. Supp. 2d at  
5 1308. Salas cannot sue under a provision that does not provide a private right of  
6 action.

7 b) The Service Contract complies with Section 1794.4.

8 Regardless, the Service Contract complies with Section 1794.4 because the  
9 relevant terms are sufficiently “clear and conspicuous.” Terms are clear and  
10 conspicuous if they appear in “a larger type than the surrounding text, or in a  
11 contrasting type, font, or color to the surrounding text of the same size, or set off from  
12 the surrounding text of the same size by symbols or other marks, in a manner that  
13 clearly calls attention to the language.” Cal. Civ. Code § 1791(u). Salas appears to  
14 allege that the “Buyout option[]” provisions and the provisions that “limit the[]  
15 obligation to provide the repairs that keep the product operational during the term of  
16 the Service Plan” are not clear and conspicuous because they are not sufficiently  
17 “capitalized, underlined, bolded, or written in a different size font,” nor are they “set  
18 off from the surrounding text in a way to make them stand out.” Compl. ¶ 123.

19 Those allegations are not only implausible—they are *false*. Per the Service  
20 Contract attached as Exhibit 1 to the Complaint, each section that discusses the  
21 “buyout option” is bolded and capitalized, including the buyout provision itself:

- 22 • **3. LIMIT OF LIABILITY.** The coverage amount available to You for  
23 each claim under this Agreement is the Product-age value specified in  
24 the depreciation schedule Section 14 Exchange or Buyout.
- 25 • **6. OBLIGATION FULFILLED.** If pursuant to Section 14 the Product  
26 is Exchanged or a Buyout is provided, Our contractual obligations under  
27 this Agreement are fulfilled.
- 28 • **11. SERVICE EVENT.** After Your claim is authorized, We will, at Our  
option, (a) repair Your Product, using parts pursuant to Section 13 Repair  
Parts, or (b) Exchange or Buyout Your Product as provided in Section

14. The decision to repair, Exchange, or Buyout Your Product will be made solely by Us.

**IMPORTANT NOTE:** If three service repairs have been completed on the same part, and that part requires a fourth repair, as determined by Us, we will likely at our sole discretion – provide an Exchange, or Buyout for Your Product as provided under Section 14.

- **12. UNABLE TO REPAIR.** If We determine that We are unable to repair Your Product for any reason, such as the unavailability of functional part, service, or technical information, We will Exchange or Buyout Your Product as provided in Section 14. We may provide at Our discretion, an Exchange or Buyout, as provided in Section 14 when parts are on extended backorder or technical information is unavailable, for a minimum of forty-five (45) calendar days. . . .
- **14. EXCHANGE OR BUYOUT.**

Compl. § Ex. 1 (Service Contract).

The same is true of those provisions that “limit the[] obligation to provide the repairs that keep the product operational during the term of the Service Plan.” Compl. ¶ 123; *id.* Ex. 1 (“**18. EXCLUSIONS**”). Salas does not allege (and cannot allege) what more is needed to make those provisions stand out. Inasmuch as Salas alleges that those provisions are not clear and conspicuous because they are “piece-meal” (Compl. ¶ 124), Salas is wrong because they appear on the first two pages of the (short) Service Contract, and Song-Beverly’s “clear and conspicuous” language does not prohibit piecemeal provisions. The Song-Beverly count fails as a matter of law.

***(4) Salas Does Not Allege that any (Non-Existent) Technical Violation of Song-Beverly Caused Him Harm.***

AIGWG did not breach any provision of the Song-Beverly Act, as explained below. But even if it did, Salas was required to allege facts showing how that (unpled) breach caused him damages. *See* Section IV.A.3 above. Because he fails to do so, this claim should be dismissed. *Von Grabe*, 312 F. Supp. 2d at 1308 (“Plaintiff must . . . specifically plead what specific requirements of § 1794.4 or other provision of the Song Beverly Act were not complied with *and what damages were suffered by such omissions.*”) (emphasis added).



1           **D.     Salas Fails to State a Claim for Violations of the CLRA or UCL**  
 2                           **(Counts Two and Four).**

3           Salas’s CLRA and UCL claims are premised on largely the same facts, and they  
 4 fail for similar reasons. *First*, both claims sound in fraud, but Salas has not pled them  
 5 with particularity. The claims fail for that reason alone. *Second*, Salas cannot use the  
 6 UCL to change the parties’ bargain. *Third*, Salas fails to state a claim under the UCL’s  
 7 “unlawful” prong because his predicate statutory claims fail and because breach of  
 8 contract cannot form the basis for a UCL claim. *Fourth*, Salas fails to state a claim  
 9 under the UCL’s “unfair” prong because his allegations fail the applicable pleading  
 10 standards and because he fails to plead the elements of the claim. *Fifth*, Salas fails to  
 11 state a CLRA claim because he does not plausibly allege that AIGWG did anything  
 12 to deceive a reasonable consumer or that AIGWG owed Salas a duty to disclose.

13                           **(1)     Salas Does Not Plead His Claims with Particularity.**

14           “The UCL prohibits any ‘unlawful, unfair, or fraudulent business act.’” *Santa*  
 15 *Barbara Smokehouse, Inc. v. AquaChile, Inc.*, 2020 WL 6743592, at \*4 (C.D. Cal.  
 16 July 7, 2020) (quoting Cal. Bus. & Prof. § 17200). “An act can be alleged to violate  
 17 any or all of the three prongs of the UCL — unlawful, unfair, or fraudulent.” *Chulick-*  
 18 *Perez v. CarMax Auto Superstores Cal., LLC*, 2014 WL 2154479, at \*5 (E.D. Cal.  
 19 May 22, 2014). “The CLRA makes illegal various ‘unfair methods of competition  
 20 and unfair or deceptive acts or practices undertaken by any person in a transaction  
 21 intended to result or which results in the sale or lease of goods or services to any  
 22 consumer.’” *Herremans v. BMW of N. Am., LLC*, 2014 WL 5017843, at \*8 (C.D. Cal.  
 23 Oct. 3, 2014) (citing CAL. CIV. CODE § 1770(a)). “Conduct that is likely to mislead a  
 24 reasonable consumer violates the CLRA.” *Herremans v. BMW of N. Am., LLC*, 2014  
 25 WL 5017843, at \*8 (citation omitted). Where UCL and CLRA claims “sound in  
 26 fraud,” the claims must be pled with particularity under Rule 9(b). *Chulick-Perez*,  
 27 2014 WL 2154479, at \*5-6.

As a threshold matter, Salas’s UCL and CLRA claims both sound in fraud, so Salas was required to plead them with particularity under Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). Salas alleges, for example, that Defendants perpetuated the Payout Scheme (Compl. ¶¶ 106(a) - (c), 107(d), 108(a), 140(f), 140(i)), falsely represented that their long-term service plans provide better value than their short-term service plans (Compl. ¶¶ 106(d), 107(g), 137, 140(b)), falsely represented that the service plans offer “100% Factory Certified Parts and Technicians” even though they have the right to swap a covered appliance with a refurbished appliance (Compl. ¶ 107(e)), falsely represented that the service plans are a mere extension of the Whirlpool manufacturer warranty (Compl. ¶¶ 107(a), 136, 140(a), 140(g)), made false representations that caused consumers to call the wrong repair number (Compl. ¶ 140(h)), and falsely represented, “If We can’t Fix it – We Replace It” (Compl. ¶¶ 107(b), (c)).

Even ignoring that the lion’s share of those allegations has nothing to do with what actually happened to Salas (*see* Section IV.A. above), Salas does not even attempt to plead the “who, what, when, where, and how” of that alleged fraud as required by Rule 9(b) (*Cafasso ex. rel. United States v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1055 (9th Cir. 2011))—undoubtedly because there was no fraud. This Court should dismiss Salas’s CLRA and UCL claims (including his “fraudulent” prong UCL claim) with prejudice.

**(2) *Salas Cannot Use the UCL to Change the Parties’ Bargain***

Salas cannot use the UCL as a sword to change the terms of the Service Contract. Inasmuch as Salas is unhappy with his bargain—for example, by alleging that he is unhappy with the buyout clause he agreed to (even though that clause has nothing to do with his claimed injury, as explained in Section IV.A. above)—he cannot use the UCL to alter the terms of that bargain. Courts in the Ninth Circuit routinely dismiss UCL claims that would require them to rewrite contracts. *See, e.g., Quattrocchi v. Allstate Indem. Co.*, 2018 WL 347779, at \*3 (E.D. Cal. Jan. 8, 2018)

1 (“[C]ourts have found that no UCL claims lie where the defendant has followed the  
 2 express language of unambiguous provisions from insurance policies and other  
 3 contracts.”), *aff’d*, 775 F. App’x 330 (9th Cir. 2019); *Rosenbluth Int’l v. Superior*  
 4 *Court*, 101 Cal. App. 4th 1073, 1077 (2002) (explaining that the UCL is not a catch-  
 5 all for breach of contract).

6 As explained above, consumers like Salas must certify that they read the  
 7 contract terms before purchase (Bond Decl., Ex. I), and the contract contains a “free  
 8 look” period that allowed him to cancel after receipt. There was no deception, and  
 9 the fact that Salas fails to identify a single contractual provision that AIGWG breached  
 10 (*see* Section IV.B.1 above) proves it. AIGWG didn’t do anything wrong—Salas  
 11 simply wants to change the deal. That is not allowed under California law.

### 12 (3) *Salas Fails to State a Claim Under the UCL’s “Unlawful” Prong*

13 To state a claim under the “unlawful” prong, Salas was required to allege that  
 14 AIGWG “engaged in a business practice forbidden by law, be it civil or criminal,  
 15 federal, state, or municipal, statutory, regulatory, or court-made.” *Shroyer v. New*  
 16 *Cingular Wireless Servs.*, 622 F.3d 1035, 1044 (9th Cir. 2010). Salas fails to state an  
 17 “unlawful” prong claim because he does not plausibly allege that AIGWG violated  
 18 any other law. *Martinez*, 2022 WL 14118926, at \*3-4. Although he claims that  
 19 AIGWG’s alleged violations of the CLRA and Song-Beverly Act form the basis of  
 20 his “unlawful” prong UCL claim (Compl. ¶ 134), the CLRA and Song-Beverly claims  
 21 fail as matter of law as explained in Section IV.C. above and Section IV.D.5 below.  
 22 *See id.*, at \*4 (“Plaintiff fails to plead the unlawful prong of the UCL because . . . he  
 23 fails to adequately plead a violation of the Song-Beverly Act. A UCL claim stands or  
 24 falls depending on the fate of antecedent substantive causes of action.”) (citation  
 25 omitted). Therefore, they cannot provide a basis for Salas’s “unlawful” prong UCL  
 26 claim.

27 The UCL claim also fails inasmuch as it is based on Salas’s alleged breach of  
 28 contract. *See, e.g.*, Compl. ¶ 140(d)-(e). As explained in Section IV.B. above, there

1 was no breach, but even if there was, it is settled that a breach of contract claim cannot  
2 form the predicate of a UCL claim. *Shroyer*, 622 F.3d at 1044.

3 **(4) *Salas Fails to State a Claim for Violation of UCL’s “Unfair***  
4 ***Prong”***

5 While the UCL does not define “unfair,” California courts in consumer class  
6 actions generally require plaintiffs like Salas to allege that the practice “offends an  
7 established public policy or when the practice is immoral, unethical, oppressive,  
8 unscrupulous or substantially injurious to consumers.” *Hodsdon v. Mars, Inc.*, 891  
9 F.3d 857, 866 (9th Cir. 2018). Any injury to the consumer must be “substantial,” “not  
10 outweighed by any countervailing benefit to consumers,” and “not an injury the  
11 consumers themselves could reasonably have avoided.” *Martinez*, 2022 WL  
12 14118926, at \*4.

13 Salas’s “unfair” prong claim fails because he did not allege facts meeting that  
14 test. Salas does not identify any policy that AIGWG allegedly violated, nor does he  
15 plead facts demonstrating that AIGWG’s (unpled) conduct was “immoral, unethical,  
16 oppressive, unscrupulous or substantially injurious” to Salas. As discussed in detail  
17 above, most of the alleged conduct by the Defendants has nothing to do with Salas.  
18 At most, Salas makes vague (and conclusory) allegations that AIGWG deceived Salas  
19 into calling the wrong phone number so that he would receive repairs under the  
20 “inferior” service plans rather than the superior manufacturer warranty. Compl. ¶  
21 140(h). That conclusory allegation makes no sense. Why would AIGWG encourage  
22 customers to seek coverage under a plan for which it is the obligor (Compl. Ex. 1 at  
23 p.1) when customers are covered by the manufacturer warranty that is covered  
24 exclusively by Whirlpool? Salas’s allegation is not just implausible; it defies logic.  
25 *Cf. Petzshke v. Century Aluminum Co. (In re Century Aluminum Co. Sec. Litig.)*, 729  
26 F.3d 1104, 1108 (9th Cir. 2013) (allegation not credited as true where it is “merely  
27 possible rather than plausible” and there is an “obvious alternative explanation”)  
28 (emphasis omitted).

1 Salas also fails to allege facts (as opposed to conclusions) showing why  
 2 AIGWG is at fault for Salas’s allegedly calling the wrong service number. *Martinez*,  
 3 2022 WL 14118926, at \*4 (dismissing “unfair” prong UCL claim where the plaintiff  
 4 failed to allege that his injury was not one that he “could reasonably have avoided”).  
 5 Nor does Salas plead any facts explaining why his “concerns about the product  
 6 remained unresolved after [Whirlpool’s] service visit” (Compl. ¶ 82) that would  
 7 justify his hiring an independent repair person and incurring out-of-pocket expenses.  
 8 Salas’s barebones, implausible allegations are not sufficient to state a claim under the  
 9 UCL’s “unfair” prong.

10 **(5) *Salas Does Not Allege Facts that AIGWG Violated the CLRA.***

11 Without explaining how, Salas alleges that AIGWG violated five CLRA  
 12 provisions by its “omissions, misrepresentations, and practices” (Compl. ¶ 111).  
 13 Among other things, those provisions bar misrepresentations about a service’s  
 14 “characteristics, . . . uses, [or] benefits” (Cal. Civ. Code § 1770(a)(5)); about a  
 15 service’s “standard, quality, or grade” (*id.* § 1770(a)(7)); about a service’s “rights,  
 16 remedies, or obligations” (*id.* § 1770(a)(14)); (4) that the “subject of a transaction has  
 17 been supplied in accordance with a previous representation” (*id.* § 1770(a)(16)); and  
 18 that the “consumer will receive a rebate, discount, or other economic benefit” (*id.* §  
 19 1770(a)(17)).

20 Salas merely lists those provisions without explaining what alleged conduct  
 21 purportedly violates which provision or how. The claim fails for that reason alone,  
 22 because Salas does not give AIGWG of fair notice of why its alleged conduct violates  
 23 the CLRA. *Cf. Cork v. CC-Palo Alto, Inc.*, 534 F. Supp. 3d 1156, 1183 (N.D. Cal.  
 24 2021) (requiring the plaintiff to plead facts sufficient to give Defendants “fair notice  
 25 of the basis of the CLRA claim”).

26 Moreover, inasmuch as this claim is based on AIGWG’s alleged “omissions”  
 27 (Compl. ¶ 111), the claim fails because Salas does not (and cannot) allege that  
 28 AIGWG had a duty to disclose or that Salas relied on any omission. *Steele v. GM LLC*,

2018 WL 6039838, at \*2-3 (C.D. Cal. Aug. 8. 2018). And, Salas certified before purchase that he reviewed the Service Contract’s terms, (Bond Decl., Ex. I), which address those topics. As a matter of law and common sense, he cannot claim that he was misled about things he agreed to before purchase. Salas also alleges that Defendants made “illusory” promises because any contractual rights “could be freely extinguished by Defendants’ decision to exercise the Buyout options.” Compl. ¶ 109. But as explained throughout this Motion, Salas has no standing to challenge the Buyout provision, which in any event is an express term in the Service Contract that Salas certifies he read and could have canceled at least 30 days and up to 60 days after receipt. Compl. Ex. 1, §§ 14, 19, 32.

Moreover, Salas’s CLRA claim, which is based on the same alleged “omissions, misrepresentations, and practices” (Compl. ¶ 111) that comprise his UCL claim, fails for all the reasons explained in the UCL section above.<sup>9</sup> See Section IV.C.1-4. Salas has not alleged that AIGWG did anything “likely to mislead a reasonable consumer.” *Herremans*, 2014 WL 5017843, at \*8 (citation omitted).

#### **E. The Express Terms of the Service Contract Bar Salas from Recovering Out-of-Pocket Expenses or Consequential Damages.**

The Service Contract expressly bars Salas from recovering damages for “out-of-pocket” expenses based on an independent “repair person[’s] . . . visit[ing] his home and fix[ing] his appliance” (Compl. ¶¶ 14, 82, 83, 129) or lost income from his scheduling a service visit during work hours (Compl. ¶ 80), two forms of relief that he seeks in his prayer. See *Walker v. McCloud Cmty. Servs. Dist.*, 2016 WL 951635, at \*2 (dismissing damages under Rule 12(b)(6)).<sup>10</sup>

<sup>9</sup> In his CLRA count, Salas also requests an order enjoining “Defendants’ methods, acts, and practices in conducting transactions in California in violation of the . . . Magnuson-Moss Warranty Act[] and California False Advertising Law.” Compl. ¶ 115. Salas does not allege that Defendants violated either act and in any event does not plead predicate facts to establish a violation of either.

<sup>10</sup> Although Rule 12(b)(6) is the proper vehicle to challenge a damages prayer where, as here, the plaintiff’s allegations are not sufficient to warrant an award of damages



1 Various provisions of the Service Contract significantly limit the scope of  
 2 recoverable damages in this case. Section 8 states that Salas “will not be reimbursed  
 3 for work not authorized by Whirlpool,” including work performed by an “independent  
 4 repair person” that is not “authorized or requested” by Defendants. Compl., Ex. 1, §  
 5 8. Section 11 contemplates that Defendants be given three chances to repair Salas’s  
 6 range. Compl., Ex. 1, § 11 (“If three service repairs have been completed on the same  
 7 part, and that part requires a fourth repair, as determined by Us, we will likely at our  
 8 sole discretion - provide an Exchange, or Buyout for Your Product. . . .”). The Service  
 9 Contract also bars recovery for any “INCIDENTAL OR CONSEQUENTIAL  
 10 DAMAGES, INCLUDING BUT NOT LIMITED TO . . . LOST TIME.” Compl., Ex.  
 11 1, § 30; *see also id.* at § 18H (“This Contract Does Not Cover . . . Consequential  
 12 damages, including damages: (2) caused by . . . or loss of business, including loss of  
 13 profits. . . .”).

14 Given these various limitations, Salas does not allege facts showing that he is  
 15 entitled to recover his out-of-pocket expenses for hiring an independent repairman to  
 16 fix his range or to recover damages for lost wages. *First*, with respect to out-of-pocket  
 17 expenses, Salas does not allege that Defendants “authorized or requested” Salas to  
 18 hire an independent repair person or that he provided Defendants with the invoice and  
 19 a description of the charges. Nor does Salas allege that he gave Defendants more than  
 20 one chance to repair his range. On the contrary, Salas alleges that Whirlpool “serviced  
 21 the appliance *within the parameters that Defendants established for the Service Plan*”  
 22 (Compl. ¶ 81 (emphasis added)), indicating that Salas did not tell Defendants that he  
 23 believed Whirlpool’s repair was insufficient, never mind that he planned to hire an  
 24 unauthorized repairman to make further repairs. Absent those kinds of factual  
 25 allegations, the Service Contract bars Salas from recovering the costs of an  
 26 independent repairman.

27  
 28 as a matter of law (*see Walker*, 2016 WL 951635, at \*2), AIGWG alternatively seeks  
 to strike that prayer under Rule 12(f).

1        *Second*, with respect to damages for lost wages, Salas’s allegation that “he took  
2 time off from work to meet the repair technician and lost the opportunity to earn  
3 income during this period” is insufficient to recover those lost wages and income.  
4 Compl. ¶ 80. The Service Contract unequivocally bars recovery of any such damages.  
5 Compl., Ex. 1, § 30 (no incidental or consequential damages, including damages for  
6 lost time); *id.* at § 18H (no consequential damages, including damages for loss of  
7 business or loss of profits.”). No amendment can cure these issues—the Service  
8 Contract that Salas put at issue is clear and unambiguous. This Court should dismiss  
9 Salas’s prayer for out-of-pocket expenses and lost wages with prejudice.

10        **F. Leave to Amend is Futile.**

11        Leave to amend a complaint should not be granted where, as here, amendment  
12 would be futile. And amendment is futile if the amended complaint would be  
13 immediately subject to dismissal. *Raifman v. Wachovia Sec., LLC*, 2012 WL  
14 1611030, at \*2 (N.D. Cal. May 7, 2012). Salas can never state a cognizable legal  
15 theory against AIGWG because, among other reasons, (1) he lacks standing to sue  
16 because he has not alleged (and cannot allege) that he has suffered *any* legally  
17 cognizable harm as a result of AIGWG’s conduct; (2) he cannot state a breach of  
18 contract claim because AIGWG didn’t breach the contract; (3) he cannot state a Song-  
19 Beverly claim because the Service Contract and plan website prove that there was no  
20 violation; and (4) he cannot state a CLRA or UCL claim for many incurable reasons,  
21 including that most of the alleged conduct has nothing to do with Salas. No additional  
22 pleading can change those realities. For at least those reasons, this Court should deny  
23 leave to amend.

24        **V. CONCLUSION**

25        AIGWG respectfully requests that this Court dismiss the Complaint with  
26 prejudice.

27        ///

28        ///



1 Dated: September 27, 2023

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2  
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